exercised where, for example, a lorry driver is convicted of an offence such as driving his own private car without being covered by a third party insurance policy. (See *Burrows* v. *Hall*[2]). It may well be considered that a disqualification limited to the type of vehicle in respect of which the offence was committed, namely, a motor-car, is sufficient without imposing a complete disqualification, the effect of which would be to deprive him of his livelihood as a lorry driver. But such a disqualification, it is to be noted, may be limited to the same class or description as the vehicle in respect of which the offence was committed.

The use of the words "class" or "description" in the corresponding section of the English Road Traffic Act, 1930, gave rise to difficulties of construction and interpretation which were exemplified and illustrated in the case of *Petherick* v. *Buckland*[3]. In that case the Justices had limited a driving disqualification to the driving of "five hundredweight vehicles". The question that the Divisional Court was asked to decide on a case stated was whether this was a "class or description" of vehicles within the meaning of section 6(1) of the Act (corresponding to section 4(1) of our Ordinance). The Divisional Court found itself unable to say what a "description" of a vehicle means in the section, or who is to prescribe descriptions of vehicles. While the Court was not prepared to say that the Justices could not themselves lawfully make "five hundredweight vehicles" a "description" of vehicles it pointed out the inconvenience of an order of this nature being made by the Justices, and it directed that in future limited disqualifications should refer to "vehicles which can be found under a particular class in the Act or under a particular description in the regulations." That is a direction which might, I venture to suggest, be conveniently and properly followed by Magistrates in this country. Section 4(1) of the Ordinance prescribes the "classes" into which motor vehicles shall be divided and column 1 of the Table contained in paragraph 4 of Rule 6 of the Motor Vehicles (Driving Licence) Rules, 1959, by reference to Rule 6(3), comprises the class or description of motor vehicles in respect of which persons may be granted a licence to drive. In the event of a Magistrate exercising his discretion to limit the disqualification imposed by him to, for example, a licence to drive motor vehicles of the class or description comprised in "Group D — Motor Car" shown in column 1 of the Table contained in the Motor Vehicles (Driving Licence) Rules, it is desirable that he should say so in express terms in the order made by him before transmitting a copy of that order to the Registrar of Motor Vehicles.

In the present case the Magistrate disqualified the defendant from holding or obtaining a licence to drive a private motor-car for 12 months. I think that order as it stands is bad for uncertainty since the term "private car" is not to be found in the classification of motor vehicles under section 4 of the Ordinance or in the classification and description of such vehicles under the Motor Vehicles (Driving Licence) Rules. Under the discretionary power vested in this Court I therefore direct that the terms of the order be varied to an order disqualifying the defendant from holding or obtaining a licence to drive a motor vehicle of the class or description comprised in "Group D — Motor Car" as shown in column 1 of the Table contained in the Motor Vehicles (Driving Licence) Rules, 1959, for a period of 12 months as from the date of his conviction on the 27th day of December, 1960. I direct that a copy of this Order be sent to the Registrar of Motor Vehicles, Penang.

Order Varied.

Solicitor: *Lee Thean Chu.*

CHEAH SWEE HOCK v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) March 21, 1961]

[Penang — Criminal Appeal No. 5 of 1961]

Possession — Right to — Rival claimants to car which is subject matter of cheating case — Bona fide purchaser for value without notice — 'Mercantile agent' — Factors Act, 1889, ss.1(1), 2(1) — Sale of Goods Act, 1893, ss.23, 24.

Criminal Procedure — Jurisdiction of Magistrate holding an inquiry under s.441 of the Criminal Procedure Code — Criminal Procedure Code, (S.S. Cap. 21), ss.435, 436 and 441.

Hire-purchase transaction — Whether a moneylending transaction.

This was an appeal from a decision of the learned Magistrate arising out of an inquiry held by him under section 441 of the Criminal Procedure Code, as to the right of possession of two rival claimants, the appellant and a finance company, in respect of a motor-car which one Loo Lean How had fraudulently transferred to the company and who had been convicted of cheating.

Held: (1) the company was a purchaser in good faith and without notice of any defect in the seller's title to the car;

(2) at the time Loo Lean How sold the car, he was acting as a 'mercantile agent' within the meaning of section 1 of the Factors Act, 1889, that he was in possession of the car and all the documents of title to the car with the consent of the owner, that the company acted in good faith in acquiring the car, and that the sale or disposition to the company was, therefore, as valid as if Loo Lean How had been acting with the express authority of the owner;

(3) the words 'in the manner hereinafter mentioned' contained in section 436 of the Criminal Procedure Code, must necessarily refer to section 441 and the procedure therein specified;

(4) there was a sale of the car by Loo Lean How to the company and that Loo Lean How entered into a Hire-Purchase Agreement in respect of the car. The transaction was therefore not a moneylending transaction.

Cases referred to:—

(1) *Oppenheimer* v. *Fraser & Wyatt & Anor.* [1907] 2 K.B. 50.

(2) *Folkes* v. *King* [1923] 1 K.B. 282.

(3) *Joblin* v. *Watkins & Roseveare (Motors) Ltd.* [1949] 1 All E.R. 47.

(4) *Gladys Nugawela* v. *Soon Teck Finance Co.* [1960] M.L.J. 302.

(5) *Olds Discount Co. Ltd.* v. *Cohen* [1938] 3 All E.R. 281.

(6) *Wong Yong Thong* v. *Reg.* [1957] M.L.J. 22.

CRIMINAL APPEAL.

Chang Min Tat for the appellant.

Eusoffe Abdoolcader for Lombard Acceptance (M) Ltd.

Rigby J.: This is an appeal from a decision of the learned Magistrate, Mr. Ng Mann Sau, arising out of an inquiry held by him, under section 441 of the Criminal Procedure Code, as to the right of possession of rival claimants in respect of a motor-car, bearing Registration No. PA. 5841, which was the subject matter of a cheating case dealt with in the Sessions Court, Penang, in which one, Loo Lean How, was convicted and sentenced to 12 months' imprisonment on the 12th October, 1960.

Before dealing with the arguments raised in the course of the appeal it is desirable that I should set out the relevant facts. Some time in May, 1960, Cheah Swee Hock, the present appellant and a resident of Penang, bought the car Registration No. PA. 5841 from a Malay resident in Alor Star, Kedah, for $3,400. The whole transaction was effected through a broker, Loo Lean How. Cheah Swee Hock obtained possession of the car and all the relevant documents relating to the transaction. Loo Lean How then extended his services to Cheah Swee Hock by offering to go to the Registration Office in Alor Star, Kedah, to effect the transfer. This offer was accepted and Cheah Swee Hock handed over the car and the Registration Book to him for this purpose. What happened immediately after that is not quite clear. But what is clear is that subsequently Cheah Swee Hock, acting presumably under the fraudulent inducement of Loo Lean How, put his signature, in Chinese characters, to a formal Notice of Change of Possession of a Motor Vehicle Form, in respect of the car. That Form bears the date 9th June, 1960. The Form, when produced in evidence, bore the rubber stamp of "Lombard Acceptance (M) Ltd." in the space reserved for the name of the transferee. It does appear, however, that that stamp is superimposed over an erasure and it is open to doubt as to whether the transfer was executed in blank or whether it contained the name of some other person or transferee. Unfortunately, no one appears to have considered it desirable to ask Cheah Swee Hock, during the course of the inquiry any questions at all concerning this Form. However, armed with this Notice of Change of Possession of a Motor Vehicle Form, whether it was then in blank, or actually in his name, or already in the name of Lombard Acceptance (M) Ltd., together with the Registration Book of the car — which is, of course, *prima facie* evidence of title — and the car itself, Loo Lean How proceeded to the Lombard Acceptance (M) Ltd. and transferred the car to that company, through one of its responsible representatives. He then entered into a Hire-Purchase Agreement with the company in respect of the car. The company agreed to the car being transferred into his name, subject to an endorsement that it was itself the registered owner of the car. The prescribed forms required under the Road Transport Regulations were duly filled in and subsequently sent to the Registrar of Motor Vehicles, Penang, and later produced in evidence during the course of the inquiry. Subsequently, Loo Lean How fell into arrears with the payment of the instalments under the Hire-Purchase Agreement and the company, after having sent him a letter dated the 16th September, 1960, notifying him that unless the arrears were paid within 7 days they would terminate the agreement, on his failure to pay, did, in fact, terminate the agreement. Whether they in fact resumed possession of the car before the actual resumption of possession is not entirely clear. However, the fraud was discovered and Loo Lean How was prosecuted to conviction.

The question then arose as to who was to have possession of the car, Cheah Swee Hock or the Lombard Acceptance (M) Ltd. The matter was apparently referred to the Magistrate to hold an inquiry under section 441 of the Criminal Procedure Code. He did so, and held that the company was entitled to possession of the car. He based his decision on two separate and distinct grounds. First, he held that the company was a purchaser in good faith and without notice of any defect in the seller's title to the car. Secondly, he held that at the time Loo Lean How sold the car he was acting as a "mercantile agent" within the meaning of section 1 of the Factors Act, 1889, that he was in possession of both the car and all the documents of title to the car, with the consent of the owner, that the company acted in good faith in acquiring the car, and that the sale or disposition to the company was, therefore, as valid as if Loo Lean How had been acting with the express authority of the owner. I find myself in complete agreement with the learned Magistrate on both these grounds and, in particular on the first ground.

Section 24(2) of the Sale of Goods Act (applicable in the Federation by virtue of section 5(2) of the Civil Law Ordinance, 1956) enacts :—

> "Notwithstanding any enactment to the contrary where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his representative, by reason only of the conviction of the offender."

Section 23 of the same Act defines the position of a sale under a voidable title. It enacts :—

> "When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title."

Cheah Swee Hock had willingly and voluntarily parted with the possession of the car and

documents of title to Loo Lean How, even though his consent to handling them over had been obtained by fraud. As the Court pointed out in the case of *Oppenheimer* v. *Fraser & Wyatt & Another*[1] (a decision subsequently approved and followed by the Court of Appeal in *Folkes* v. *King*[2]), "the law is perfectly clear that, if there is consent in fact, the operation of this Act is not destroyed by proving that the consent was obtained by fraud...." Loo Lean How had, therefore, obtained a title to the car even though that title was voidable at the instance of the person defrauded. On the facts it is apparent, however, that that voidable title had not been avoided at the time Loo Lean How transferred the ownership of the car to the company: nor is there anything upon the record to show, or any reason to believe, that the company had any notice of any defect in the title, or that it was not acting in good faith, in the ordinary course of its business, at the time it acquired the ownership from Loo Lean How. That is really enough, subject to certain other arguments raised by Mr. Chang Min Tat, who appeared for the appellant, to dispose of this appeal. But upon both the facts and the law I agree with the decision of the learned Magistrate, that the disposition and transfer of the car from Loo Lean How to the company was protected under the Factors Act and was sufficient to give the company a good title to the car under that Act. On this matter I cannot do better than quote the relevant part of the careful and closely reasoned judgment of the learned Magistrate in which he said as follows :—

"The next question that follows is whether Loo Lean How had any authority to sell the car. He had the authority to sell if he was a mercantile agent coming within the definition of sections 1(1) and 2(1) of the Factors Act, 1889. Section 1 of the said Act defines 'mercantile agent' as an agent 'having in the customary course of his business as such agent authority either to sell goods, or to consign goods for purpose of sale...'. And section 2(1) outlines the powers of a mercantile agent with respect to disposition of goods in these words: — 'Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.' Applying the above principles to the present case, I am satisfied from the circumstances of the case that Loo Lean How, being a car broker, was a mercantile agent and that he on 9.6.60 was in possession of the said car and the Log Book to the said car with the consent of Cheah Swee Hock. I am further satisfied from the evidence before me that Chung Kok Heng, as agent for Lombard Acceptance (M) Ltd., transacted the Hire-Purchase Agreement, between Loo and Lombard Acceptance (M) Ltd. in good faith and without notice of the defect in title. The transfer form (Ex. P.5) (which transferred the said car to Lombard Acceptance (M) Ltd.) appeared to be in order and bearing the signature of Cheah Swee Hock. We have the evidence of witness No. 4, the Registration Clerk attached to the Road Transportation Department, that from the office copy of the Registration Card (Ex. P. 4) everything was 'above board'."

In the course of his able argument on behalf of the appellant, Mr. Chang Min Tat submitted that on the facts the learned Magistrate had no jurisdiction to hold the inquiry under section 441 of the Criminal Procedure Code under which he purported to act. Section 441 provides :—

"441. (1) The seizure by any police officer of property taken under section 28 or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Police Court which shall make such order as it thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property."

Mr. Chang Min Tat submitted that :—

(a) the car was not seized under section 28; or

(b) that it was not "alleged or suspected to have been stolen"; or

(c) that it was not found under circumstances which created suspicion of the commission of any offence.

The evidence upon the record was that it was Cheah Swee Hock who took the car to the police. Mr. Chang Min Tat submitted that the car was not produced as an exhibit in the case and that there was, therefore, no authority under section 441 for the Magistrate to hold any inquiry and that the car should in consequence have been returned to Cheah Swee Hock, the person who produced it to the police and out of whose possession it was taken. That argument appeared to me to be a cogent one. But on further reflection it seems to me that it fails to give adequate consideration to the preceding sections 435 and 436. Section 435 enables a Court to make an order for the disposal of property regarding which an offence has been committed, and section 436 enables the Court, "in lieu of itself making an order under section 435" to "direct the property to be delivered to a Police Court which shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to it in the manner hereinafter mentioned". In this case Loo Lean How was tried and convicted in the Sessions Court, Penang, while it may well be true that the motor-car in itself was not formally physically produced as an exhibit, there can be no room for argument that the offence was committed in respect of that car and the documents relative to its possession and ownership were all before the Court. I assume, and I am of the opinion that I may properly assume, that thereafter the President of the Sessions Court, acting under section 436, referred the "property", i.e. the motor-car, to a Police Court for it to be dealt with "in the manner hereinafter mentioned". The words "in the manner hereinafter mentioned" contained in section 436 must necessarily refer to section 441 and the procedure therein specified. I am, therefore, satisfied that the inquiry was properly held by the Magistrate and that he had jurisdiction to deal with the matter.

Mr. Chang Min Tat then argued that there was, in fact, no proper sale of the car by Loo

Lean How to the company but that the whole transaction was simply a device to obtain temporary financial accommodation in the form of a money loan given by the company to Loo Lean How, at rates of interest, and that such a transaction, disguised under the cloak of a Hire-Purchase agreement, was simply a moneylending transaction. As such he submitted that the transaction was unenforceable in law as being contrary in terms to the Moneylenders Ordinance and that Cheah Swee Hock was accordingly entitled to the recovery of his motor-car. In support of his contention he cited and relied upon the cases of *Joblin* v. *Watkins & Roseveare (Motors) Ltd.*[3] and *Gladys Nugawela* v. *Soon Teck Finance Co.*[4]. The line of argument advanced by Mr. Chang Min Tat is not a novel one. The nature and effect of it and the way in which it is considered by the Courts is very clearly set out in Wild's "Law of Hire-Purchase (1960)" at page 30 in the following passage :—

"In much the same way as with the Bills of Sale Acts it has sometimes been alleged that a hire-purchase transaction in which a finance company takes part is a moneylending transaction and therefore unenforceable because the finance company is not a registered moneylender and has not complied with the provisions of the Moneylenders Acts, 1900 and 1927. The Courts have declined to accept this argument and have adopted the same principle in dealing with this class of case as with the Bills of Sale Acts, namely to discover from all the circumstances what was the *bona fide* transaction between the parties. Perhaps the matter is best summed up in the words of Porter J. in *Olds Discount Company Ltd.* v. *Cohen* [5]: '.....but what one has to remember — and I think that this might be said of almost all bodies which finance hire-purchase agreements (and they are very numerous at the present time) — is that their real function is the lending of money, and it must necessarily be so. Although that may be the object and the intention for which they exist, the question is not with what object they employ their money, but the method they have of employing it. If the method employed constitutes a sale, then the transaction is not only the lending of the money but also a purchase of the goods, even although it is only for the purpose of lending money that it is being done in that way."

On the facts of the case under consideration, upon the record as it stands and upon a consideration of the relevant documents it seems to me that there was ample evidence that there was a sale of the car by Loo Lean How to the company and that the ownership of the car passed to the company. Thereafter Loo Lean How entered into a Hire-Purchase Agreement in respect of the car. The two cases cited by Mr. Chang Min Tat are readily distinguishable. In *Joblin's case* there was a purported sale of the car with an option to buy it back at a future specified date and a cheque post-dated by the vendor for the re-purchase of the car on that date. The learned trial Judge held that the transaction was merely a device to enable the vendor to obtain temporary financial accommodation and that it did not amount to a "sale" or a "pledge or other disposition" within the meaning of section 1 of the Factors Act, 1889. In the *Nugawela's case* there was a clear and admitted loan given on the security of a motor-car and the learned trial Judge accordingly held that the purported sale of the motor-car by the borrower of the money was a simple moneylending transaction, unenforceable because of its failure to comply with the provisions of the Moneylending Ordinance, and the borrower of the money was entitled to the recovery of her motor-car.

In the result I am satisfied that this appeal must be dismissed and the order made by the learned Magistrate directing the delivery of the motor-car into the possession of the company confirmed. As was pointed out during the course of this hearing, the order made by the Magistrate as to possession does not preclude the appellant, if he is minded so to do, from instituting a civil action to determine the right of ownership (see the case of *Wong Yong Thong* v. *Reg.*[6]).

Appeal dismissed.

Solicitors: *Chang Min Tat; Presgrave & Matthews.*

JA'AFAR & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) March 25, 1961]

[Muar — Criminal Appeal No. 8 of 1961]

Criminal Law and Procedure — Sessions Court — Jurisdiction — Consent to trial by Public Prosecutor and accused — Courts Ordinance, 1948, ss.63(2) and 64.

The appellants were charged with voluntarily causing hurt while committing robbery punishable under section 394 of the Penal Code, the original punishment of which offence is penal servitude for life or imprisonment for a term which might extend to 10 years. The Public Prosecutor purporting to act under section 63 of the Courts Ordinance consented to this trial by the Sessions Court. Section 63 was explained to the appellants and they also consented to the trial. The appellants pleaded guilty. The Court sentenced the 1st and 3rd accused to 3 years and three strokes of the rattan each and the 2nd appellant to 4 years' imprisonment and four strokes of the rattan under section 64(2) of the Courts Ordinance.

Held: (1) section 63(2) of the Courts Ordinance does not permit the Public Prosecutor to consent, nor does it permit the accused to consent, to have any case punishable with death or imprisonment for life tried in the Sessions Court. The Court therefore had no jurisdiction to deal with the accused at all;

(2) section 64(2) only applies to cases in which the Sessions Court exercises its jurisdiction under section 63(1). The sentence therefore on the 2nd accused was also illegal.

Per curiam: "If whipping is to be imposed, it should be effective and to award three strokes is worse and useless."

CRIMINAL APPEAL.

Appellants in person.

Dato' D. C. Jackson (Deputy Public Prosecutor) for the respondent.

Adams J. (delivering oral judgment): The three appellants were originally charged with voluntarily causing hurt while committing a robbery punishable under section 394 of the Penal Code.